FEBRUARY 23, 1957

THE

SOLICITORS' JOURNAL

VOLUME 101

NUMBER 8

CONTENTS

CURRENT TOPICS

Omelettes and Eggs

THE MINISTER OF HOUSING AND LOCAL GOVERNMENT has retreated no further and no faster than could reasonably be expected in view of the large and influential body of opinion opposing cl. 9 and Sched. IV of the Rent Bill as now drafted. The Minister has to consider three main factors among many. First, there is the hardship which will be caused to some tenants, and secondly there is the hardship which is being caused to many landlords. Wherever the line is drawn, some deserving cases will be on the wrong side. The Minister must have been strongly tempted to pass the responsibility to the county court judges and let them decide the issue of greater hardship in individual cases: we congratulate the Minister on his courage in resisting this temptation and the county court judges on their escape. Thirdly, the Minister has to consider the public benefits which will result from a freer market in property. While the extension of the period of grace will alleviate some hardship, nevertheless, after seventeen years and more, waiting another fifteen months will be no great effort for landlords who are bent on obtaining possession and who will probably not be attracted by the incentives which the Bill offers. We doubt the wisdom of prohibiting premiums: prohibitions like this are very difficult to enforce and encourage dishonesty.

Magistrates' Courts Bill

WE welcome the proposals contained in the Magistrates' Courts Bill recently presented in the House of Lords. They will save a certain amount of time without endangering the rights of an accused person. The Bill does not propose any change in juvenile courts, but its chief proposal in other cases which must be tried summarily is that the defendant may plead guilty in writing and may be dealt with in his absence without the need for calling witnesses. The safeguard is that the defendant must be served with a statement of the facts and the prosecution will be confined to this statement. Incidentally, we think that the idea of an agreed statement of facts could with advantage be extended to pleas of guilty generally. We hope that the Bill will pass and that the greatest possible use will be made of the proposed procedure. We shall publish a more detailed examination of the Bill at an early date.

Maintenance Arrears: Attachment of Wages?

LAST year (100 SOL. J. 771) we noted suggestions made at the annual meeting of the Magistrates' Association to the effect that it might be a good thing to investigate the applicability of the Scottish system of arrestment of wages to the problem of maintenance arrears in England and Wales, where it is met largely by the negative and unconstructive expedient of committing the debtor to prison. Pursuing this suggestion, we printed at 100 SOL. J. 866 an article by a Scottish contributor explaining how the system of arrestment operates North of the Border. The matter has now been taken a stage further by publication of the text of the Maintenance Orders (Attachment of Income) Bill, introduced by Miss JOAN VICKERS, M.P., in November last year. The Bill proposes that a court by which a maintenance order is enforceable should have jurisdiction to make an "attachment of earnings order" (either at the instance of the person entitled under the maintenance order or, in committal proceedings, at its discretion). The attachment of earnings order would require the defaulter's employer to make deductions from the defaulter's earnings and to pay the sums deducted to a court official for transmission to the beneficiary. Safeguards are proposed to ensure that the defaulter would not be deprived of the means to meet the legitimate needs of his dependants and himself. Although this is a Bill in which it is right and proper that both employers' organisations and trade unions should interest themselves, it is much to be hoped that it will not prove controversial on party political lines; if only in the cause of a reduction of the prison population it is a measure which would serve a valuable end, and we shall watch its future progress with interest.

Matrimonial Causes Rules Amended

ALTHOUGH there seems little ground for expecting early legislation to implement recommendations of the Royal Commission on Marriage and Divorce, it has been known for some time that certain minor changes recommended by the Commission which could be effected by rules of court would in due course be made. This is the principal purpose of the Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176 (L.2)), which come into force on 30th April next, but without in general affecting proceedings commenced before that date. Among changes of practice which will then come into force are a number which affect the drafting of petitions and answers: thus a petitioner or respondent claiming custody of children will have to give full particulars of proposed arrangements for their support, care and upbringing; any application for maintenance or other financial relief must wherever practicable be made in the petition or answer; if the court so orders, the petition need not disclose the petitioner's address; and, following *Galloway* v. *Galloway* [1956] A.C. 299, particulars of illegitimate children of the spouses as well as children of the marriage must be set out in the petition. The decision in *Galloway* v. *Galloway* that the court's power to make provision for the custody and maintenance of children extends to any illegitimate children of the two spouses is also given effect in suitable amendments to (*inter alia*) rr. 44, 54 and 55 of the principal rules of 1950. Two reforms which obviously have much to commend them are contained in additional rules, to be numbered 54A and 54B respectively, the first enabling a petitioner, as soon as the petition is filed and even before it is served, to apply for an injunction restraining the removal of children out of the jurisdiction; and the second empowering the court to order children to be separately represented if it thinks fit. (Unlike the other amendments, these two new rules will also apply to proceedings commenced *before* 30th April.) Practitioners will need to note that service of petitions, etc., if not served personally, will no longer have to be effected by registered post—ordinary post will suffice in causes commenced on or after 30th April; and this relaxation extends to other documents authorised to be served by post under r. 12 of the 1950 rules.

Period between Decree *Nisi* and Absolute Extended

ANOTHER recommendation of the Royal Commission on Marriage and Divorce which is to be given effect on 30th April next is that contained in para. 958 of their report, advocating an increase from six weeks to three months in the period elapsing between the pronouncing of a decree *nisi* and the earliest date at which it can be made absolute. The recommendation was based on the evidence of the Queen's Proctor that six weeks was not always long enough for his inquiries to be completed. A general order of the High Court under s. 12 (1) of the Matrimonial Causes Act, 1950 (not published as a statutory instrument but obtainable from H.M.S.O.), now effects this extension in relation to proceedings commenced on or after 30th April, 1957, but preserves the power of the court to fix a shorter time by special order. The order is dated 12th February and is entitled the Matrimonial Causes (Decree Absolute) General Order, 1957.

Legal Redress

AN expensive-looking Public Notice appearing under this heading in *The Times* for 16th February is noteworthy, not only in providing an interesting postscript to the well-known history of Van Meegeren, the skilful forger of paintings, but also for the illustration it affords of a remedy available in some continental countries in suits for defamation, but not normally employed by the English courts. The notice is one of a series ordered by the court in Brussels to be published, and sets out, with a full statement of the circumstances, the court's judgment in a lawsuit concerning a Vermeer, *The Last Supper*, in which the owner sought a declaration that the picture had been erroneously depreciated in the writings of a Belgian professor, and the professor had counter-claimed for aspersions cast on his competence and scientific probity. The owner having died, his heirs desired to drop the case; but the professor insisted on his counter-claim being considered. The result was that the heirs were condemned in damages, interest and costs, "and to the insertion of the judgment in five Belgian, three Dutch, two French, two English, and two U.S.A. newspapers." Over here we should probably have taken the pronouncement of the judgment in open court as sufficient to ensure the necessary publicity. Is there an English precedent, we wonder? The notice appears from internal evidence to be a closely literal translation of a text in the French language. A curious feature is the difficulty the reader experiences in determining from the English version whether or not the judgment actually decides that *The Last Supper* is genuine or spurious. At all events, the professor's name is cleared.

VALUATION OF LIFE INTERESTS AND REVERSIONS—II

PURCHASE BY LIFE-TENANT FOR CONTROL OF THE TRUST FUND

Purchase for investment and purchase for control

THE first of these articles discussed valuations of life interests and reversions for estate duty and stamp duty. The emphasis was on market value. The present contribution discusses some of the valuation problems where the life tenant purchases the interests of the remaindermen to obtain control of the trust fund. This type of transaction and its advantages to the beneficiaries in lightening the burden of income tax, sur-tax and estate duty are already well known and need not be laboured here. The main purpose is, of course, to reduce the burden of estate duty on the death of the life tenant.

To simplify, assume that a particular life tenant is entitled to an unrestricted life interest in a fund of £100,000 2½ per cent. Consolidated Stock, worth at the valuation date, say, £53,000. The reversioner is entitled to the absolute reversion to the whole fund expectant on the death of the life tenant, subject to a presumptive claim for estate duty at, say, an estimated 50 per cent., allowing for aggregation. The life tenant wishes to purchase the reversion to obtain control over the fund; she will then be able to ask the trustees to transfer it to her. What price should she pay to the reversioner?

A purchase for control by life tenant is similar in character to other well known transactions resulting in control by the purchaser and, for the same reasons, the price paid properly differs from the ordinary investment price which a third party is willing to pay when he *does not* get control. A financier wishing to obtain control of a company's assets makes a take-over bid substantially exceeding the ordinary investment price at which shares have previously changed hands. A tenant occupying a rent-restricted house purchases the freehold from his landlord at a price somewhere between the "sitting tenant" and "vacant possession" sale prices. In passing, it may be remarked that no one has seriously suggested that such control prices contain an element of gift, just because they exceed the corresponding investment prices. All this is simply to say in a nutshell that there is, in general, a price appropriate to the circumstances of the case; and so also in a purchase by the life tenant for control of a trust fund.

The crucial difference between a purchase for ordinary investment and a purchase for control is this. A purchase for investment results merely in a change of ownership of the limited interest. A purchase by a life tenant of the absolute reversion expectant on her own death enlarges her life interest into an absolute interest in possession in the trust fund. When she has bought the reversion she can call for the fund itself from the trustees. Both beneficiaries end up with a cash sum (or cash equivalent) in substitution for their original interests. Fund less outlay represents the life tenant's net proceeds for which she has exchanged her original life interest.

Market value gap

Before trying to establish criteria for a proper control price it is worth taking a closer look at the market values (investment prices) of the existing interests in the fund. Now *even in the case of a duty-free fund* the investment prices of the life interest and the absolute reversion do not add up to the value of the fund in possession. In the example under discussion the investment prices might turn out to be approximately as follows, if the life tenant is a female aged 65:—

	£
Investment price of life interest	18,000
Investment price of reversion (*if duty-free*) ..	26,000
Total investment price	44,000
Value of fund in possession	53,000
Market value gap	£9,000

Obviously the market value gap is much larger if there is a presumptive claim for duty on the death of the life tenant.

Actuarial value and investment price

Actuarial value is not an absolute quantity: it means—or should mean—value determined by an actuary in given circumstances. The value cannot be divorced from the surrounding circumstances. So far as the actuary is concerned, there is nothing esoteric about it: like any other valuer he needs to know whether someone is buying an interest or selling it, whether with or without control, and, of course, what the interest is. The frequent misunderstanding of the term "actuarial value" is demonstrated by two recent cases before Upjohn, J. (*Re Heyworth's Contingent Reversionary Interest* [1956] Ch. 364; 100 SOL. J. 342, and *Re Cockerell's Settlement Trusts* [1956] Ch. 372; 100 SOL. J. 342) when "actuarial value" was applied to two quite different things. It is perhaps significant that an actuary seldom himself uses the expression.

Investment price, on the other hand, has a clear and severely practical meaning. In general, life interest and reversion have ascertainable investment prices. It is obvious that in a purchase for control no beneficiary would be content with terms which would leave him or her with less than could be obtained by independent action—the sale of the beneficiary's interest to a third party. The market value gap indicates the theoretical limits of this difference between control and investment prices, and equally of the difference between investment sale and control transaction in the life tenant's case.

Arm's length negotiations

In a purchase for control there are two possibilities which merit careful distinction. The first is where the parties engage in negotiations at arm's length. Separate actuaries normally advise each side and bargaining between purchaser and vendor produces eventually an agreed price. In such circumstances and provided the parties are not acting arbitrarily, it would be difficult to contend that there was any element of gift one way or the other. Uninformed bargaining might well be another matter.

Parties at one

In other fields arm's length negotiation is the more usual procedure, but in the writer's experience only some two out of ten of the transactions under discussion develop in that way. The reason is not far to seek. Life tenant and reversioner are often related. It is therefore not surprising to find that the parties are at one in seeking to terminate the trust, and a single actuary is asked to advise both sides impartially on the proper control price to be paid in the circumstances. Obviously this price must be consistent with

the requirement that there is no element of gift: he must hold the scales evenly balanced between the beneficiaries in arriving at a single figure between the two limits already discussed. The recommended price for buying the reversion will be greater than the investment price, and if the purchase is completed at the recommended figure then the element of gift is obviously excluded. Different actuaries may arrive at different figures—in much the same way as different accountants will arrive at different values for private company shares. Where the market value gap is wide the weight to be given to different factors is very much a matter of judgment and experience.

It is always possible that a beneficiary will find the actuary's conclusions unexpected and the figures unattractive to him personally. All beneficiaries, however well disposed to the idea of a scheme, make some reservations. Provided a dissenting beneficiary has reserved full freedom of action, the transaction can be completed after further negotiations between the parties as to price. Minor adjustments might be agreed informally, but if the area of disagreement is at all large it is an elementary precaution in such circumstances to have proper evidence of arm's length negotiations to support a finally agreed price. If the possibility of bargaining can be foreseen, it is sometimes arranged that the actuary is instructed to report to one party only, as a start, giving that party figures on the basis of an impartial approach.

The actuary's valuation

There are several considerations which the actuary must take into account in recommending a control price for the reversion. The health of the life tenant is particularly important, because if she is in failing health the value of the reversion, other things equal, is greater. The presumptive claim for estate duty and the burdens of income tax and sur-tax come next and mention should be made of the nature of the present trust investments and the trustees' investment policy, restricted as it often is by a narrow investment clause, all of which may affect value. The heavy stamp duty on the purchase price is usually the major expense, and the costs generally affect price—as in any other transaction—for it is the net proceeds of sale and purchase with which the beneficiaries are concerned. A word of warning where there are a number of reversioners. Advances to reversioners to be brought into hotchpot without interest determine the distribution of the fund on the death of the life tenant and therefore the *proportions* in which the control price is split between reversioners. It is, of course, incorrect to bring the advances into account directly with the aggregate control price.

Though investment prices determine the natural limits within which the control price must lie they are not normally suitable criteria of value for purposes of a purchase for control. Investment prices are in practice affected by a number of factors which are irrelevant to a purchase for control. For example, the investment price of a particular reversion or life interest (especially a reversionary life interest) might be virtually *nil*. Thus a beneficiary might well conclude, e.g., for personal tax reasons, that the investment price is less attractive to him personally than the interest itself: in other words the interest in question has a personal value greater than its investment price. All this must be taken into account by the actuary; and if he is advising impartially his recommended control price is calculated to secure an equitable division of any tax and duty saving elements in the transaction.

It is not unknown for an actuary to receive instructions from those who are unfamiliar with these transactions to inject some arbitrary element into his calculations, e.g., a direction to ignore a presumptive claim for estate duty or to assume hypothetical trusts. Such instructions generally emanate from a misconception of the nature of the valuation problem. It is essentially a simple one: each beneficiary is to receive a lump sum in place of his or her existing interests. And like any other comparable transaction there is a control price appropriate to the circumstances. The dangers are obvious. Where the parties are at one the effect of an arbitrary instruction to the actuary may well be indistinguishable in effect from an act of bounty. The actuary cannot at one and the same time advise impartially on the basis that there is to be no element of gift either way and accept an arbitrary instruction which is bound to benefit one beneficiary relatively.

Multi-tiered and other trusts

Not all purchases for control relate to the simple trusts discussed in our early example. Sometimes the trust involves successive life interests instead of one alone. In the simplest case of this character Miss Jones (testator's spinster daughter) enjoys a life interest in possession; Mrs. Smith (testator's married daughter) takes a life interest in reversion, falling into possession on the death of Miss Jones. The interest of the reversioner (young Smith) is more remote. So far as Miss Jones, the present life tenant, is concerned the interests of the Smiths add up to the absolute reversion expectant on Miss Jones's death. It follows that the control price of the absolute reversion expectant on the death of Miss Jones must be split between Mrs. Smith and her son, and that will, of course, depend, among other things, on the extent of any presumptive claim for duty on the death of Mrs. Smith if she dies after Miss Jones.

In passing it may be mentioned that the release by Mrs. Smith of her *reversionary* life interest is not affected by the provisions of the Finance Act, 1950, s. 43, which is concerned only with life interests in possession. The release accelerates the reversion and young Smith the reversioner would then receive the whole of the purchase price from Miss Jones.

It is not possible to generalise on the complications that are sometimes discovered in other types of trust except to say that a first step invariably is to establish clearly the estate duty position both before and after the proposed transaction. The existing position is often affected by past payments of duties now obsolete (Finance Act, 1914, s. 14; Finance Act, 1949, s. 29).

Apportionment of the trust fund

A direct apportionment of the fund between life tenant and reversioner is no doubt a more direct method of replacing the beneficiaries' existing interests by cash equivalents (shares of the trust fund in absolute possession). But the effect on the liability for estate duty is different because of the mischief of the Finance Act, 1950, s. 43. The life tenant's interest in the share of the fund received by her on a direct division of the fund is *enlarged* from a life interest into an absolute interest in possession of her share. Her life interest in the share of the fund taken by the reversioner is not enlarged but determined. Unless hitherto there was no presumptive claim for estate duty on the death of the life tenant, there is a (continuing) liability for estate duty on the reversioner's share. If the life tenant dies within five

years the trustees are personally liable. In an apportionment of a dutiable fund therefore the question whether there is a dutiable element of gift does not matter because the whole of the reversioner's share is dutiable anyway under s. 43, no matter how large it might be. As far as the Estate Duty Office is concerned (on the death of the life tenant within five years) the beneficiaries have complete freedom of choice on their relative shares in an apportionment. In a purchase by the life tenant for control of the fund the circumstances need careful distinction and the function of the actuary differs accordingly.

If the life tenant is young and healthy, the contingent liability for duty on the share taken by the reversioner on apportionment may well be unlikely to mature and the cost of a suitable insurance against the claim might be relatively inexpensive. When the division of the fund is taking place by mutual consent of the beneficiaries on the basis of the impartial advice given by an actuary there is obviously no quantum benefit. In those circumstances the stamp duty payable on the apportionment deed will be nominal. The consequential saving in stamp duty may more than compensate for the contingent duty claim (if any). It may be therefore that a direct apportionment of the fund is not only simpler but also less costly to arrange. Certainly the alternative is worth considering where the presumptive claim for duty is very small.

Conclusion

In the previous article on the valuation of life interests and reversions for duty purposes, the conclusion was that hypothetical valuation methods using published annuity values produce results which have no validity in a practical world. And that is no less true when one comes to the severely practical problems associated with a purchase by life tenant for control.

G. V. BAYLEY

A Conveyancer's Diary

ENFORCEABILITY OF POSITIVE COVENANTS

THE full facts in *Halsall* v. *Brizell* [1957] 2 W.L.R. 123, and p. 88, *ante*, are voluminous : the statement of them in the *Weekly Law Reports* runs to over six pages. But for the purpose of explaining and bringing out the decision on the main question which arose in this case they can be stated quite shortly and very simply. In 1851 an area of some forty acres in what is now part of the City of Liverpool was laid out by its owners in plots as a high-class building estate. The plots were sold off, but various pieces of realty (roads, sewers, a promenade, and so forth) remained vested in the original owners. In the conveyances to them of the various plots which they purchased the purchasers entered into covenants with their vendors, and these covenants were repeated in an omnibus deed of covenant entered into between the vendors and the purchasers of the several plots. These covenants included restrictive covenants of the kind one would expect to find in this class of development. Nothing turned on these, and the only point of interest thereon is their date : this was only three years after the decision in *Tulk* v. *Moxhay* (1848), 2 Ph. 774, so commonly, and erroneously, regarded as the earliest reported example of the insertion in an assurance of freehold land of covenants intended on the one hand to enure for the benefit of and on the other hand to descend as a burden on the respective successors in title of the parties to the conveyance containing them. As a conveyancing device such covenants are some decades older ; they were no novelty when, e.g., *Duke of Bedford* v. *Trustees of the British Museum* was decided in 1822 (2 My. & K. 552).

To return to the recent case, the covenant in the deed of 1851 which led to trouble was a positive covenant by each purchaser of a plot that he and his heirs, executors, administrators and assigns would contribute a due proportion in respect of his plot of the expenses of maintaining the aforesaid roads, sewers, promenade and so forth. The deed contained elaborate provisions for what was, in effect, the levy of a private rate for this purpose. There was also a power to distrain in the event of non-payment. The defendants were the successors in title of the purchaser of one of the plots, their testator (they were executors) having purchased in 1931, and they objected to the method by which the amount of the levy in respect of their plot had been computed. The result was an originating summons for the construction of the 1851 deed, which raised two questions : first, was the covenant to pay this private rate enforceable against the defendants at all ; and, secondly, was the method of computing this rate to which the defendants had objected a permissible method ? This latter question was one of pure construction of the deed of 1851, and is of no general interest. The first question, *per contra*, raised important, although not difficult, points of principle.

This was how Upjohn, J., dealt with this question. In his judgment it was plain that the defendants, the successors in title of the original covenantor, could not be sued on the covenants in question for at least three reasons. " First," the learned judge said, " a positive covenant in [these terms] does not run with the land. Secondly, these particular provisions with regard to the payment of calls plainly infringed the rule against perpetuities. Of course, these parties are not parties to the contract. Finally, it is conceded that the provision for distraining on failure to pay is not valid. A right to distrain can only be annexed to a rent-charge, which this certainly is not . . ."

Covenant not running with land

As to these three reasons, the first is, of course, not in doubt ; the leading authority on this is *Austerberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 750, from which I need cite only the first two paragraphs of the headnote. These state that " the doctrine of *Tulk* v. *Moxhay* is limited to restrictive stipulations, and will not be extended so as to bind in equity a purchaser taking with notice of a covenant to expend money on repairs or otherwise which does not run with the land at law," and " *Semble*, that the burden of a covenant (not involving a grant) never runs with the land at law, except as between landlord and tenant." The validity of this second statement, although cautiously introduced by the word " *semble*," has never been questioned since *Austerberry* v. *Corporation of Oldham* was decided.

The reference to a grant in the second of these statements is really a reference to the earlier decision in *Morland* v.

Cook (1868), L.R. 6 Eq. 252, in which Lord Romilly, M.R., had held that a covenant contained in a partition deed that the expense of keeping certain sea walls in repair should be borne by the parties to the deed respectively and their respective heirs and assigns bound the successors in title of the parties to the deed. The case was treated as indistinguishable from *Tulk* v. *Moxhay*, although the court was urged to distinguish it on the ground that in the one case the covenant had been a negative one, whereas in the other it was positive ; as such the decision cannot now be upheld. But Cotton, L.J., in *Austerberry* v. *Corporation of Oldham*, suggested another interpretation of the decision in *Morland* v. *Cook* on the basis of which it may, perhaps, be treated as good law ; after referring to the method of assessing the proportions in which the charge should be borne as between the various owners of the partitioned land, which was on an acreage basis, the learned lord justice said that this was " really a grant by each of the parties of a rent-charge of so much money as would be equivalent to his proportion of the total expense of repairing the sea wall."

The rule against perpetuities

This brings us to the second of the two reasons given by Upjohn, J., for holding the particular covenant in *Halsall* v. *Brizell* to be unenforceable, that it infringed the rule against perpetuities. Even if it had been possible to construe the covenant to make a proportionate payment towards the repair of the roads, sewers, etc., as the grant of a rent-charge issuing out of each plot, as Cotton, L.J., had suggested as at least a possible construction of the similar (but by no means identical) covenant in *Morland* v. *Cook*, still there would have been difficulties in establishing the enforceability of the covenant as between the successors in title of the covenantees on the one hand and the successors in title of the covenantor on the other. The burden of the covenant would, on this footing, have run with the land at law. But the benefit thereof could not have been so annexed to the covenantees' land as to run with it in perpetuity without infringement of the rule against perpetuities, for the right to receive payment of a rentcharge, and to distrain for it in the event of non-payment, is an interest at law, and no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.

I have entered into this brief discussion of the decision in *Halsall* v. *Brizell* with particular reference to the perpetuity point because it is, I think, important to realise that, however it is looked at, a positive covenant between vendor and purchaser cannot be enforced otherwise than between the original parties thereto or their respective personal representatives. The frequency with which one sees covenants to maintain fences and the like expressed as respectively binding upon and enuring for the benefit of the successors in title of the covenantor and the covenantee makes me feel that this principle is not as widely appreciated as it should be. In many cases, of course, the unenforceability of these covenants is of no great practical significance. But parties do sometimes rely on what seems to them to be the plain language of the instrument containing the covenant, and this may lead to trouble, especially where the covenant relates to the repair of part of a building originally intended for single occupation and ownership which in changing circumstances has been divided into several freehold tenements.

Taking the benefit of a deed

In such a case a person seeking to enforce a covenant to repair or maintain may not find himself so lucky as the plaintiffs in *Halsall* v. *Brizell*. For, after holding that the covenant in question was unenforceable as a covenant, Upjohn, J., went on : " But it is conceded that it is ancient law that a man cannot take a benefit under a deed without subscribing to the obligations thereunder. If authority is required for that proposition, I need but refer to one sentence during the argument in *Elliston* v. *Reacher* [1908] 2 Ch. 665, 669, where Lord Cozens-Hardy, M.R., observed : ' It is laid down in Co. Litt. 230*b*, that a man who takes the benefit of a deed is bound by a condition contained in it, though he does not execute it.' " Applying this principle, Upjohn, J., held that the defendants could not, if they desired to use the roads, sewers, etc., on the estate, as they did, take advantage of the trusts concerning those premises contained in the 1851 deed without undertaking the obligations thereunder. It is easy to see the force of the dilemma in which the defendants were placed in *Halsall* v. *Brizell*—no rate, no roads or sewers. The position of, e.g., the owner of an upper part of a house which has been divided horizontally seeking to enforce a covenant to repair on the part of the owner of the lower part as against a successor of the covenantor may be much less favourable. The only " benefit " within this principle which the former can wave in the face of the latter is likely to be the benefit of a covenant to keep the upper part in repair, and a threat to disregard that obligation can easily be seen to be pretty hollow. In these cases the purchaser should always be warned that there may be a lacuna in the provisions relating to the repair of the fabric of the building as a whole which no amount of ingenuity in the drafting of the conveyance can fill.

" A B C "

" THE SOLICITORS' JOURNAL," 21st FEBRUARY, 1857

On the 21st February, 1857, The Solicitors' Journal noted : " In the *Daily News* . . . in the report of the trial of an action . . . in the Exchequer, the following passage occurs : ' Mr. Serjeant Thomas—An imputation has been cast upon the attorney in this case. May I observe that this action was brought by the advice of my learned friend, Mr. Charnock, and myself. Mr. Baron Bramwell—You are not justified in making any such statement ; it is not, as counsel, your province to do so. Mr. Serjeant Thomas excused himself by saying that the attorney for the plaintiff had been attacked. Mr. Baron Bramwell—Let the attorney submit to it, then.' We believe . . . that this is a correct report . . . and we think it our duty to point out that the plaintiff's attorney . . . was harshly and unfairly treated and that he ought not to have been expected to ' submit ' to the attack made upon him by the defendant's counsel. We have been informed that the case was one of actual wrong to the plaintiff, that the defendant had treated her very shamefully . . . There was substantially no defence and a very skilful advocate and great master of vituperative rhetoric was reduced, by the dearth of other topics, to heap abuse upon the attorney. Now, we apprehend that Baron Bramwell was quite correct in laying down that the plaintiff's counsel overstepped his province when he said that the action was brought under his advice . . . But . . . an attorney thus unfairly . . . assailed owes to the profession generally the duty of at least offering to vindicate his own character ; and . . . the presiding judge would do well to allow him a brief hearing . . . Such an interruption would be quite as seasonable as the jokes of some judges and the platitudes of others."

Landlord and Tenant Notebook

" EXCLUSIVE OCCUPATION " AND THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946

THE decision in *R.* v. *Battersea, Wandsworth, Mitcham and Wimbledon Rent Tribunal; ex parte Parikh* [1957] 1 W.L.R. 410; *post*, p. 192, has, besides showing that in contrast to what happened in the case of railways the merger of rent tribunals has not shortened their appellations, given us an interesting illustration of the differences between paying guests and lodgers, between occupation and possession, and between form and substance.

The question was whether the respondent tribunal had had jurisdiction to determine the reasonable rent payable under a particular contract, and depended on whether that contract was, as the Furnished Houses (Rent Control) Act, 1946, s. 2 (1), says: " a contract . . . whereby one person (hereinafter referred to as ' the lessor ') grants to another person (hereinafter referred to as ' the lessee ') the right to occupy as a residence a house or part of a house . . . in consideration of a rent which includes payment for the use of furniture or for services, whether or not, in the case of such a contract with regard to part of a house, the lessee is entitled, in addition to exclusive occupation thereof, to the use in common with any other person of other rooms or accommodation in the house . . ."

The grant

The agreement which the applicant had made was evidenced by a letter addressed by one Mrs. *F* to the wife of the applicant, who, Goddard, L.C.J., observed, had been advised on the matter. It began: " Dear Mrs. Parikh, I, *M F*, formerly residing at . . . and at present employed as waitress with . . . to whom a reference may be made . . . am thankful to you for accommodating me as your paying guest in a room on upper floor, furnished at an all-inclusive charge of £2 10s. per week payable in advance every Thursday or latest Friday morning on weekly basis: I have two children . . ." It proceeded: " You will at all times have access to my room and be entitled to ask me to leave the premises with a week's notice in writing or verbal; similarly I shall give you a week's notice. . . ." There followed what might be called covenants as to maintenance and against nuisance; an acknowledgment of a key, and a covenant to deliver up, and one for payment of a deposit against breakages, etc. The letter concluded with: " Again thanking you, Yours sincerely, M. Flynn."

Despite the reiterated expression of gratitude, Mrs. *F* referred the contract to the local rent tribunal, where the then respondent unsuccessfully contended that that body had no jurisdiction (it reduced the rent to £1 12s. 6d. a week). He was equally unsuccessful in his application for a writ of certiorari.

Paying guests

Rent control legislation has, of course, been particularly fruitful of decisions showing that it is the substance of an agreement, and not its wording, that has to be considered. One need only mention such a case as *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386 (C.A.): " The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put upon it "; and indeed, in *R.* v. *Battersea, etc., Tribunal; ex parte Parikh*, Cassels, J., observed that " paying guest " was not an accurate description when the " paying guest " has to do all her own work in connection with the accommodation which she has and the only thing she is provided with is a little food. This was merely added to his expression of agreement with his colleagues, the essential question being whether, whatever she was called, the grantee occupied part of the house as a residence, enjoying exclusive occupation of that part.

The expression " paying guest " has, in fact, been under review in more than one landlord and tenant case, other than rent control cases. Unsuccessful attempts have been made to evade covenants against business or covenants to use a house as a private residence only by calling contributory sharers " paying guests." In *Thorn* v. *Madden* [1925] Ch. 847, the tenant of a house which was beyond her means " secured visitors to come and live there for short or long periods upon payment for board and residence." It was not, Tomlin, J., held, like a case of two friends, " when to the one designing to pay a visit the other says: ' I cannot afford to keep you, but I shall be delighted to see you if you will pay ' "; and this decision was followed in *Tendler* v. *Sproule* [1947] 1 All E.R. 193 (C.A.), the court declining to draw a distinction because the tenant, unlike the lady in the earlier case, was not shown to have taken any active steps to secure what the county court judge called " paying lodgers."

Lodgers

It was said on behalf of the respondents in *R.* v. *Battersea, etc., Rent Tribunal; ex parte Parikh*, that rent tribunals had been in the habit of treating lodgers' agreements as being referable to them under the terms of the Act of 1946. The statement was probably not intended to be an argument; " whatever is, is right " is not a proposition which would commend itself to a divisional court; but " lodger " does seem aptly to describe the relationship evidenced by the facts and by the grantee's letter and, as Goddard, L.C.J., said, s. 2 (1) deals, among other matters, with the position where a person has exclusive occupation of a room or some part of a house and is using some other rooms in the house in common with the other occupants of the house. The respondent's argument made the most that it could out of the words " you will at all times have access to my room," but that, the learned Lord Chief Justice held, did not exclude the Act or mean that the applicant (to the tribunal) had not got exclusive occupation of the room, the door of which she could lock. She had the exclusive right to use the room as her residence.

The right to occupy

It was Lynskey, J., who emphasised the distinction between a right to occupy and a right of possession: " There is nothing in the Act which requires that there shall be a letting of possession." The learned judge was also able to point out that the applicant before him had, when filling in the rent tribunal form (Sched. I to the Furnished Houses (Rent Control) Regulations, 1946), given the " number and description of rooms occupied or used exclusively by the

lessee" as "one room on upper floor with use of bath, kitchen and garden," which amounted to a statement that in his own view the position between him and his "lessee" corresponded to what the Act described. I do not think that the judgment was meant to imply that a point of jurisdiction is never open to one who has missed that point when complying with a notice requiring information (penalty for failure without reasonable cause, a fine not exceeding £20, or three months' imprisonment, or both: s. 9 (2)), especially when the terms of the requirement beg the question whether he is what the Act calls a "lessor."

R. B.

HERE AND THERE

NOT "ON THE RUN"

A FIGURE of speech which has come near to outliving its original new-minted vividness is the phrase about escaped prisoners or prisoners-to-be being "on the run." As a vision of the human quarry fleeing across great open landscapes from the relentless and inevitable pursuit of the hounds of justice it has a certain dramatic merit. But in fact running is in most circumstances the least effective technique of escape. In a crowd of walkers or saunterers it draws unnecessary attention to the runner. Also it incites to pursuit the sporting spectator, even when he is no minion of the law. The only instance I can recall of the condition of being "on the run" being intelligently employed as a technique was when an escaping convict in a French film slipped off his prison clothes and, unobtrusive in his underwear, joined a string of passing athletes in a long-distance race. Apart from such very special opportunities, the escaping convict is more often on the slink than on the run, but, though less physically exhausting, it is scarcely less likely to arouse suspicion. Both runners and slinkers tend to attract the notice of inquisitive children and congenitally suspicious dogs. Safety lies in finding a place where one can do exactly what everybody else is doing, blending with the landscape as a wild bird does with its protective colouring. If one could stroll into one of the oldest London clubs and fall asleep in an armchair with all the virtuosity of the oldest member that would do splendidly. One could maintain a reposefully comatose existence for days on end in perfect safety. But, it will be objected, few escaped prisoners have the manner to carry it off. Maybe, but it is surprising what escaped prisoners do carry off, what varied talents they evince and how gifted they are for leading ordinary normal lives when protective colouring demands it. Take the recent case of the two businessmen of Jesmond, that pleasant suburb of Newcastle-on-Tyne. It was early in November that they first appeared in the city, put up at a private hotel and created a satisfactory impression from the start by paying their way with five-pound notes. Then they took luxurious flats in Jesmond, paying six months' rent in advance. They hired an office and set up with a salesman and a girl secretary in their employment and properly headed notepaper as "textile manufacturers." Charming and well-dressed, they seemed cut out to make a success of their business and social lives. They got supplies of textiles from Manchester. Their deals ran into thousands of pounds. They entertained at the best hotels. The younger of the two had many women friends who were fascinated by him, as well they might be. Then, one day, the two men hurried off on an urgent business trip. Next day the police arrived and found their flats empty. It had been discovered that they were escaped prisoners from Wormwood Scrubs. They had arrived in Newcastle only two days after their break-out, wearing prison officers' coats, and settled in immediately. One was a London clerk serving a seven-year sentence for breaking and entering and carrying a loaded revolver. The other was a company director serving a six-year sentence for false pretences and fraudulent conversion. You can't believe your ears or your eyes, can you?

NATIONAL INSTITUTIONS

IT is strange that our most characteristic national institutions, football pools and television, have as yet produced nothing in the way of national monuments or conscious rituals. In the past when men have believed in something—in religion or railways or law or learning or citizenship, their belief has expressed itself in magnificence of building and deliberate ceremonial. Why have the football pools, to which millions daily turn their thoughts and their hopes and their meditations, not produced as yet some temple as large as Westminster Abbey and as beautiful as St. Pancras Station? Why is that magic box which people believe can bring them all the excitement of under-water exploration without the bother of getting wet, all the glory of pilgrimage without a single blister on the feet, treated with anything less than the reverence of a family shrine? Why in the humblest, most heavily subsidised, home is not a television room regarded as a necessity, a place apart, as much as a bathroom? Why is it not officially recognised as a family shrine, the place where the gods and goddesses show themselves to the people in all their unearthly beauty? The nearest that the English national institution of gambling has come to official recognition has been the launching of premium bonds. It is hard to understand why it has never linked itself with litigation, why the turf focuses the attention of gamblers in their millions, while the possibilities of the Law Courts have been so palpably neglected. Yet the uncertainties of the running horses are as nothing compared with the hazards of an action at law. One might say of litigation what General Monck said of the military art: "No science or faculty whatsoever in multitude of parts may be compared to the art military wherein every small and unregarded circumstance quite altereth the nature of the action . . . and many strange chances so alter the course of things that no foresight may discern what may happen." A couple of days' influenza for your solicitor, a moment's absent-mindedness on the part of a witness, a conflicting commitment for your counsel, the individual personality of the judge, his predictable predispositions or his unpredictable moods—all would give the English gambling instinct the widest possible scope. The perfect litigant is as reckless as the perfect lover—

> "He either fears his fate too much
> Or his deserts are small
> Who dare not put it to the touch
> To gain or lose it all."

Only the other day a libel action provided a notable example of the impenetrable mist of uncertainty in which all litigation is shrouded. The proprietor of a well-known club

was suing a newspaper for libel. Under the heading, "Hot Babies for the Baby Sitting Corps and it's Freud's Idea," the paper had published an article which its counsel presented to the jury as purely jocular, while the learned judge told them that they might either consider that the worst that could be said of it was that it was in deplorable taste or that it was more than that and was defamatory. The jury thought that it was defamatory and awarded £200 damages. But the plaintiff had to pay the costs of the day, for only the day before the defendants (not, their counsel emphasised, on his advice) had paid £1,250 into court. The plaintiff, at his peril, had left it there. The way some juries go, he might well have got more, but in fact he lost. Why hasn't the Strand established itself as the townsman's Epsom or Lewes?

RICHARD ROE.

PRACTICE NOTE—COURT OF PROTECTION

APPLICATIONS UNDER THE TRUSTEE ACT, 1925

For the purpose of simplifying the procedure in the Court of Protection on applications under the Trustee Act, 1925, and in pursuance of his powers under r. 147 (1) of the Management of Patients' Estates Rules, 1934, the Master has directed that as from 1st March, 1957, every originating summons relating to trusts constituted by a written document or to the statutory trusts shall be entitled in the matter of the relevant trusts and in the matter of the patient and in the matter of the Trustee Act, 1925.

The terms of the direction are as follows:—

THE COURT OF PROTECTION

Pursuant to my powers under r. 147 (1) of the Management of Patients' Estates Rules, 1934, I hereby direct that as from the 1st March, 1957, every originating summons relating to express trusts constituted by a written document or to the Statutory Trusts shall be entitled in the matter of the relevant trusts and in the matter of the patient and in the matter of the Trustee Act, 1925, and accordingly the following paragraph shall be substituted for paragraph 3 (ii) of Form A of the schedule to the said rules:—

"(ii) Relating to land held upon the Statutory Trusts:—
53 Vic. c.5 and Amending Acts. 195..... No.....
IN THE MATTER of the Statutory Trusts (defining them)
and
IN THE MATTER of (Patient)
and
IN THE MATTER of the Trustee Act, 1925.

RAYMOND JENNINGS,
11*th February*, 1957. *Master.*

For the assistance of practitioners a comprehensive precedent of a summons under s. 54 of the statute is given below. As regards applications under s. 36 (9) of the statute, the titles appearing in the precedent would require to be adapted by substituting "(Section 36 (9))" for "(Section 54)."

The entitlement of applications under s. 128 of the Lunacy Act, 1890, is not affected by this notice.

Solicitors are reminded that in suitable cases the fees of counsel for settling applications and appearing in support thereof will be allowed.

THE COURT OF PROTECTION

53 Vic. c.5 and amending Acts. 19..... No.....

See Note (1) {
(*a*) [IN THE MATTER of the Trusts of (the Will dated the 19 and the Codicil thereto dated the 19 of deceased) (a Settlement dated the 19 and made between, etc.) (a Conveyance dated the 19 and made between, etc.) (an Assent dated the 19 under the hands of and as personal representatives of deceased)]
}

See Note (2) {
(*b*) [IN THE MATTER of the Statutory Trusts arising under the Law of Property Act, 1925, relating to the property comprised in a Conveyance dated, etc.]
(*c*) [IN THE MATTER of the Statutory Trusts arising under the Administration of Estates Act, 1925, on the intestacy of , deceased, who died on the 19 .]
}

and
IN THE MATTER of *A B* (*Patient*)
and
IN THE MATTER of the Trustee Act, 1925 (Section 54).

Let all parties concerned attend, etc., on the application on behalf of the above-named *A B* (*Patient*) by *C D* of in the County of the Receiver of his income appointed by Order dated the 19 and of in the County of the continuing trustee of the above-mentioned (Will) (Settlement) (Conveyance) (Assent) (Statutory Trusts) (or as the case may be) for an Order:—

1. That of, etc., or some other fit and proper person may be appointed a new trustee of the said (Will) (Settlement) (Conveyance) (Assent) (Statutory Trusts) (or as the case may be) in substitution for the said *A B* and to act jointly with the said the continuing trustee thereof.

2. That any necessary vesting order may be made.

3. That the reasonable and proper costs of the Applicants and of the Respondents of incident to and consequent upon this application be taxed and be paid by the new trustees out of the property or funds subject to the said trusts or the proceeds of sale thereof.

Dated the day of 19 .

Taken out by of ,
Solicitor for the Applicants.
of

NOTES.

(1) This will include the ordinary case where land is conveyed to two or more persons on an express trust for sale for themselves beneficially. No description of the property is normally required in the title.

(2) This will include the case where land is conveyed to two or more persons beneficially without an express trust. As in the case of an express trust, no description of the property is normally required.

Mr. Anthony Clive Knocker, solicitor, of Sevenoaks, Kent, left £66,565 (£65,383 net).

Mr. Alfred Newton, solicitor, of Stockport, left £52,776.
Mr. H. H. Thompson, solicitor, of Cheltenham, left £46,293 net.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

House of Lords

CRIMINAL LAW: CONSPIRACY IN ENGLAND TO DEFRAUD ABROAD

Board of Trade v. Owen and Another

Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Tucker and Lord Somervell of Harrow

29th January, 1957

Appeal from the Court of Criminal Appeal ([1956] 3 W.L.R. 739; 100 Sol. J. 769).

The respondents were convicted on the third count of an indictment charging them with conspiracy to defraud by conspiring in London and elsewhere together and with Austay London, Ltd., and other persons to defraud an export control department (known as Z.A.K.) of the Federal Republic of Germany by causing Z.A.K. to grant licences to export certain metals from the Republic of Germany, representing to Z.A.K. that the metals would be supplied to and consumed by Irish manufacturers, well knowing that they were in fact to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R. The Court of Criminal Appeal quashed the conviction. The Board of Trade appealed to the House of Lords.

Viscount Simonds and Lord Morton of Henryton said that they agreed with the opinion which Lord Tucker was about to deliver.

Lord Tucker said that the matters alleged disclosed a conspiracy which would be indictable if the acts designed to be done and the object to be achieved were in this country. There was little doubt that a government department acted to its detriment if it issued a licence enabling something to be done which it was charged with the duty to prevent. Although the count did not expressly state the locality where the fraudulent representations were to be made or the licence was to be obtained, the evidence showed that the conspiracy must have been one in which the representations were designed to be made in Germany and the licence was to be obtained there. If the evidence had established a conspiracy to make false representations here and thereby obtain here a licence of this nature, there would have been a criminal conspiracy. The question remained whether the fact that the evidence disclosed a conspiracy here to make false representations in Germany and obtain a licence there rendered the conspiracy one which could not be made the subject of criminal prosecution. If such conspiracies as this were punishable in the criminal courts of England, it was remarkable that no case had ever been found in which anyone had ever been convicted of such an offence. The gist of the offence of conspiracy being the agreement, whether or not the object was attained, it might be asked why it should not be indictable if the object was situate abroad. The answer was that it was necessary to recognise the offence to aid the preservation of the King's peace and the maintenance of law and order within the realm, with which, generally speaking, the criminal law was alone concerned. The object of making such agreements punishable was to prevent the commission of the substantive object before it reached the stage of an attempt. The view was not acceptable that the locality of the acts to be done and of the object to be attained was irrelevant to the criminality of the agreement. The Attorney-General argued that this, being a conspiracy to defraud, came within the class of conspiracies to do acts which were *mala in se* and as such, criminal in their nature, irrespective of locality. Ideas as to what was *mala in se* varied widely in different periods and different parts of the world. The classification might be of assistance in certain spheres of law, but the criminal law required the maximum degree of definition and so uncertain a test was ill-suited for the determination of the limits of criminality in the field of conspiracy. The task of determining what conspiracies, if any, were to be triable and punishable here when the acts planned would not have been indictable here if carried out abroad was not suitable for the House in its judicial capacity. If it was in the public interest that such conspiracies should be triable and punishable here, it was for the Legislature so to determine. In the field of criminal law the comity of nations could best be served by treaties of extradition. The decision of the Court of Criminal Appeal that a conspiracy to commit a crime abroad was not indictable here unless the crime contemplated was one for which an indictment would lie here was correct. It followed that a conspiracy of the nature charged (a conspiracy to attain a lawful object by unlawful means, rather than to commit a crime) was not triable here, since the unlawful means and the ultimate object were both outside the jurisdiction. His lordship reserved for future consideration the question whether a conspiracy in this country, which was wholly to be carried out abroad, might not be indictable here on proof that its performance would produce a public mischief here or injure a person here by causing him damage abroad. The appeal should be dismissed.

Lord Radcliffe, who was unable to be present, had asked his lordship to say that he concurred.

Lord Somervell agreed. Appeal dismissed.

Appearances: *Sir Reginald Manningham-Buller*, Q.C., A.-G., *Neville Faulks* and *David Hurst* (*Solicitor to the Board of Trade*); *Neil Lawson*, Q.C., and *Sebag Shaw* (*Stikeman & Co., Malcolm MacDougal*).

[Reported by F. H. Cowper, Esq., Barrister-at-Law] **[2 W.L.R. 351**

Court of Appeal

CONTRACT FOR SALE OF CAR: INNOCENT MISREPRESENTATION THAT CAR WAS 1948 MODEL: RELIANCE ON REGISTRATION BOOK

Oscar Chess, Ltd. *v.* Williams

Denning, Hodson and Morris, L.JJ. 13th November, 1956

Appeal from Neath and Port Talbot County Court.

In 1955 the defendant entered into a hire-purchase transaction through the plaintiff car dealers to acquire a new car, the car dealers agreeing through their salesman to take in part exchange a second-hand 10-horse-power Morris car acquired by the defendant's mother for £300 in 1954. The registration book of the Morris car showed it as having been first registered in 1948, with five changes of ownership between 1948 and 1954. The salesman, who was personally familiar with the particular Morris car, after ascertaining from a trade reference book the current price for a 1948 Morris of that model, allowed £290 for it; and the hire-purchase transaction was concluded on that basis. An invoice addressed to the defendant and recording the completed transaction described the car as a "1948 Morris 10 saloon." Eight months later the car dealers found out from the manufacturers that the Morris was a 1939 model; the outward appearance of that model had not been altered between 1939 and 1948. The current price for a second-hand 1939 model would have been £175. The car dealers thereupon brought an action to recover from the defendant as damages £115, the difference in value between a 1939 and a 1948 Morris, claiming that it was an express condition of the contract, or alternatively a warranty, that the Morris car was a 1948 model. At the hearing the salesman stated that, at the time of the transaction, the defendant had offered a 1948 10-horse-power Morris in part exchange and had produced the registration book. The defendant did not give evidence. The county court judge held that the assumption that the car was a 1948 model was a fundamental condition of the contract, breach of which, in view of the lapse of time, entitled the car dealers to damages. The defendant appealed.

Denning, L.J., said that both parties had assumed that the car was a 1948 model; both were mistaken, and their mistake was of fundamental importance, such that if the buyer had come promptly he might have succeeded in getting the whole contract set aside in equity; but it was now too late for him to do so and his only remedy was in damages if he could prove a warranty. Using the word "warranty" in its ordinary meaning of "a binding promise," what was the proper inference to be drawn on the known facts in the present case? It must have been obvious to both parties that the seller had himself no personal knowledge of the year when the car was made. He only became owner after a great number of changes. He must have been relying on the

registration book. It was unlikely that such a person would warrant the year of manufacture. The most he would do would be to state his belief, and then produce the registration book in verification of it. In those circumstances the intelligent bystander would say that the seller did not intend to bind himself so as to warrant that it was a 1948 model. The motor dealers who bought the car clearly relied on the year stated in the log-book. If they had wished to make sure of it they could have checked it then and there by writing to the makers. They did not do so at the time, and, not having done so, they should not be allowed now to recover against the innocent seller who produced to them all the evidence he had, namely, the registration book. The appeal should be allowed.

HODSON, L.J., concurring, said that there was no evidence to support the conclusion that the statement that the car was a 1948 model was a term of the contract. The case was in essentials on all fours with *Routledge* v. *McKay* [1954] 1 W.L.R. 615.

MORRIS, L.J., dissenting, said that the statement that the defendant made was definite and unqualified, and not a mere expression of tentative or qualified belief. All concerned honestly believed that the car was a 1948 model; but everything in the case pointed to the importance of that statement. It was not a mere representation in respect of the subject-matter of the contract; it was made contractually; it related to a vitally important matter; it described the subject-matter of the contract then being made; it directed the parties to and was the basis of their agreement as to the price to be paid or credited to the defendant. *Routledge* v. *McKay*, *supra*, was distinguishable. His lordship would have dismissed the appeal. Appeal allowed.

APPEARANCES: *Breuan Reece* (*Helder Roberts & Co.*, for *Ivor Evans & Benjamin*, Swansea); *Norman Francis* (*A. King-Davies & Son*, Maesteg).

[Reported by Miss M. M. HILL, Barrister-at-Law] **[1 W.L.R. 370**

HUSBAND AND WIFE: HOUSE PURCHASED FOR HOME: ENTITLEMENT OF PARTIES AFTER DIVORCE

Fribance *v.* Fribance (No. 2)

Denning, Hodson and Morris, L.JJ. 29th November, 1956

Appeal from Karminski, J.

Parties who married in 1933 became in 1940 tenants of the ground floor of a dwelling-house, at which time they had two children. On the husband's joining the Royal Air Force it was agreed that he should retain all his pay and allowances, except for the compulsory allotment to the wife, and save what he could, while the wife should go to work to support the family. On demobilisation in 1946 the husband had some £260 in savings and gratuity, part of which was spent for the benefit of the family. Thereafter he handed the bulk of his earnings to his wife, who continued to work and support the household with her earnings. In 1950 the leasehold of the matrimonial home was acquired in the husband's name for £950, of which £800 was raised on mortgage; £130, the remains of his savings, was contributed by the husband, and £20 was contributed by the wife from the surrender of an insurance policy. In 1952 differences arose between the paries, which led to a suit for divorce by the wife, who, before decree absolute, applied under s. 17 of the Married Women's Property Act, 1882, for an order to determine the interests of the parties in the house. The registrar held that the wife's interest was limited to £20. On appeal, Karminski, J., held that the parties held in equal shares. The husband appealed.

DENNING, L.J., said that Karminski, J., thought that the case came within the decision in *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63. It was argued for the husband that the wife had no right to or share in the house unless she could prove some contract, gift or trust. But *Rimmer* v. *Rimmer* showed that cases between husband and wife ought not to be governed by the same strict considerations as are applied to the respective rights of strangers. If it were clear that the property, when acquired, was intended to belong to one or the other absolutely, then effect should be given to their intention. But in many cases the intention of the parties was not clear, as they had never formed one. When parties acquired family assets by their joint efforts, they were not contemplating future separation or divorce. So long as they lived together, it did not matter which did the saving and which did the paying. In the present case it was the husband who saved, but it might have been the other way round, and the title to the assets did not depend on the mere chance which way round it was. They should take in equal shares, and the judge had been right in applying *Rimmer* v. *Rimmer*, *supra*.

HODSON and MORRIS, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *D. Tolstoy* (*Hillearys*); *H. S. Ruttle* (*Edwin Coe & Calder Woods*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 384**

LANDS TRIBUNAL: COSTS: DISCRETION: TRIBUNAL'S FEE: SUCCESSFUL APPELLANT DEPRIVED OF COSTS

Wootton *v.* Central Land Board

Lord Evershed, M.R., Denning and Romer, L.JJ.

15th January, 1957

Appeal by case stated from the Lands Tribunal.

The appellant owned an estate near Epsom Downs, and in 1948 he obtained planning consent for its development as a garden city in accordance with a plan which had been prepared for him by an expert. He claimed under s. 58 of the Town and Country Planning Act, 1947, the sum of £222,317 for development value. He contended before the Central Land Board that the development value must be ascertained on the basis of his plan of development. The board held that the plan was not a factor which should be taken into account and estimated the development value at so much per foot frontage on the roads, assessing it at £44,500. The appellant, pursuant to the provisions of the Lands Tribunal Act, 1949, appealed to the Lands Tribunal. The tribunal held the board was wrong on its basis of assessment and that the appellant's contention was right. The tribunal assessed the development value at £102,500, holding that the appellant in framing his claim had not taken into account the delay and risks inherent in putting the plan into operation. The tribunal made no order as to costs. The result of that order was that the appellant had to bear the tribunal's hearing fee of £500 which under para. 52 of the Lands Tribunal Rules, 1949, was payable by the appellant as claimant, without prejudice to his right to recover the amount from any other party by virtue of any order as to costs. The appellant appealed from the decision of the tribunal with regard to costs.

LORD EVERSHED, M.R., said that this appeal upon a case stated by the Lands Tribunal was unusual, since the question raised as a question of law for the court related exclusively to the matter of costs. His lordship referred to the facts and the relevant statutory provisions and rules thereunder, and said that it was common-place in cases which came before the Court of Appeal in relation to the exercise of a discretion in regard to costs, that the court was very slow indeed to interfere with such exercise unless it was shown clearly that, in the exercise of the discretion, the tribunal appealed from had in some material and substantial respect wrongly or unjudicially exercised the discretion. In the present case he (his lordship) was of opinion that the tribunal failed to exercise judicially the discretion vested in it, with the result that it was incumbent upon the court now to review and amend the tribunal's conclusion. He did not wish to make any rash attempt at laying down in precise language the limits of the tribunal's discretion, and to set out the sort of things which a tribunal could take into account in exercising the discretion, but he would point out that s. 3 of the Lands Tribunal Act, 1949, showed that a question of the award of costs was in truth one for the discretion of the tribunal, but was not otherwise subject to any special or particular limitations. To that extent, an appeal in the form of a case stated as to the power of awarding costs in s. 3 (5) of the Act of 1949 might be somewhat more open than an appeal as to costs from the High Court; but he would not wish to put it at all higher than that. In the circumstances of the present case, the tribunal had failed to exercise judicially the discretion vested in it, since in directing itself it had omitted to consider that the proceedings were in the nature of an appeal and not an arbitration; and that the appellant's view of the basis of valuation was right and that of the Central Land Board was wrong. In the light of that it was a serious misdirection of the tribunal to make no order as to costs, because both parties had made erroneous estimates as to the development value of the land in question. Further, it was wrong that in the result the appellant should pay the whole of the hearing fee of £500. While as a matter of administrative

convenience it was sensible that one party should be directed to pay the hearing fee of the Lands Tribunal in the first instance, he should be treated as paying it on behalf of the contestants and the question of the ultimate liability for its payment should rest with, and be specifically dealt with by, the Lands Tribunal in accordance with the language of s. 3 (5) of the Lands Tribunal Act, 1947. The tribunal should say by whom and in what proportions it should be paid. In the present case the order as to costs would be discharged and in lieu thereof there would be an order upon the Central Land Board to pay one-half of the hearing fee and one-half of the appellant's other taxed costs of the proceedings. The appellant was also entitled to his costs in the Court of Appeal.

DENNING, L.J., delivered a concurring judgment, and ROMER, L.J., agreed with both the judgments which had been delivered. Appeal allowed.

APPEARANCES: *R. D. Stewart-Brown* (*W. H. Chitty & Fryzer*); *Eric Blain* (*Treasury Solicitor*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] **[1 W.L.R. 424**

COMPULSORY PURCHASE: LICENSED INN: BASIS OF COMPENSATION PAYABLE TO FREEHOLD REVERSIONERS

Personal Representatives of Tull, deceased *v.* Secretary of State for Air

Denning, Romer and Sellers, L.JJ. 22nd January, 1957

Appeal from the Lands Tribunal.

In March, 1952, the Secretary of State for Air compulsorily acquired under the Defence Acts, 1842 to 1935, a licensed inn, the freeholders of which were the personal representatives of one *T*, deceased, and the lessees a firm of brewers who were in occupation under a lease which still had three and a half years to run. The reversion was owned by the freeholders and the lease stipulated that at the end of the lease the lessees were to return the licence to the freeholders. On the compulsory acquisition the licence was put into suspense in the joint names of lessors and lessees, under the provisions of the Finance Act, 1946. The brewers did not apply for the licence to be removed to other premises and the compensation payable to them for disturbance was still the subject of negotiation. The question raised by the present appeal was whether the compensation payable to the freeholders should be assessed merely on the value of a house which was adapted and suitable for use as licensed premises, or, as the freeholders claimed and the Lands Tribunal found, as a house which was in fact licensed, credit being given for the value of the licence in suspense.

DENNING, L.J., said that it was well settled that compensation must be paid for the land taken, injurious affection to other lands, severance and disturbance. Also, before the Finance Act, 1946, which enabled a licence to be put into suspense, it was settled that compensation for licensed premises included the increase in value because they were licensed; and there was no reason why that should not also apply after 1946; the only difference was that the licence, which before was destroyed, was now suspended. Compensation must be no more and no less than the loss sustained, so the claimants must give credit for the suspended licence. On the agreed figures the sum would be £4,500, being £3,900 the value of the reversion, plus £800 the value of the licence, minus £200 the value of the suspended licence.

ROMER and SELLERS, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *B. S. Wingate-Saul* (*Treasury Solicitor*); *J. Ramsay Willis*, Q.C., and *D. Widdicombe* (*Vandercom, Stanton and Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[2 W.L.R. 346**

COMPULSORY PURCHASE: COMPENSATION FOR DISTURBANCE: EXPENSES INCURRED IN PURCHASING NEW HOME

Harvey *v.* Crawley Development Corporation

Denning, Romer and Sellers, L.JJ. 24th January, 1957

Appeal on case stated by the Lands Tribunal.

A householder whose home had been compulsorily purchased by a new town development corporation at an agreed price of £4,148, which included the legal costs of that purchase and expenses incurred in moving her furniture and having curtains and carpets adjusted to fit a new house, claimed in addition as "compensation for disturbance" under r. (6) of s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, the surveyors' fees, legal costs and travelling expenses totalling £241 incurred by her, first, in an abortive proposed purchase of a new home and, secondly, in the purchase of a new home.

DENNING, L.J., said that the principles of compensation under the Lands Clauses Consolidation Act, 1845, and the Acquisition of Land (Assessment of Compensation) Act, 1919, were now settled, both in this country and in Scotland, by *Horn* v. *Sunderland Corporation* [1941] 2 K.B. 26 and *Venables* v. *Department of Agriculture for Scotland* [1932] S.C. 573. Those cases showed that in addition to the actual market value of the house when sold with vacant possession, the claimant was entitled to "compensation for disturbance," which was specifically preserved by s. 2, r. (6) of the Act of 1919, and included all damage directly consequent on the taking of the house under statutory powers. The agreed sum of £4,148 did not include anything in respect of the costs of £241 to which she had been put in getting another house: *Beard* v. *Porter* [1948] 1 K.B. 321. It was money expended as the direct consequence of her being turned out of her house and was properly to be regarded as compensation for disturbance. But that should not be taken too far. If a man did not occupy a house but simply owned it as an investment, his compensation would be the value of the house; and if he chose to put the money into stocks and shares, he could not claim the brokerage as compensation, for that would be too remote. The owner only recovered costs of the present kind where a house was occupied by an owner living there who was forced out and reasonably found a house elsewhere in which to live. The appeal should be dismissed.

ROMER, L.J., concurring, said that any loss, sustained by a dispossessed owner who occupied his house, which flowed from a compulsory acquisition, might properly be regarded as the subject of compensation for disturbance, provided (1) that it was not too remote, and (2) that it was the natural and reasonable consequence of the dispossession of the owner. The tribunal's decision in this case was not only right in law but accorded with common sense. The contrary view would lead to a great deal of discontent on compulsory acquisitions.

SELLERS, L.J., also concurring, said that on the principles to be derived from the authorities and the relevant Acts, it became in any given case a question of fact for the tribunal whether any particular item of expenditure came within their terms. Appeal dismissed.

APPEARANCES: *G. D. Squibb*, Q.C., and *Leslie Scarman* (*Sharpe, Pritchard & Co.*, for *P. K. S. Wilkinson*, Crawley); *Michael Rowe*, Q.C., and *J. C. Leonard* (*Peacock & Goddard*, for *Bevan, Hancock & Co.*, Bristol).

[Reported by Miss M. M. HILL, Barrister-at-Law] **[2 W.L.R. 332**

ESTATE DUTY ON SETTLED PROPERTY: WHETHER INTERESTS ACCELERATED ON FAILURE OF PRIOR TRUSTS OR RESULTING TRUST TO SETTLOR

In re Flower's Settlement Trusts; Flower and Others *v.* Inland Revenue Commissioners

Lord Evershed, M.R., Jenkins and Ormerod, L.JJ.

25th January, 1957

Appeal from Upjohn, J.

By a settlement made in 1936, Sir Archibald D. Flower gave discretionary powers to his trustees to apply the income of the trust funds during his lifetime to a wide variety of purposes which excluded from the possible objects himself, his wife and his children. Other trusts were to take effect "after the death of the settlor." The trusts expressed to take effect during the lifetime of the settlor were void for uncertainty and the trustees of the settlement took out a summons asking whether on the true construction of the settlement there was a passing of the trust property attracting estate duty on the death of the settlor (because on the failure of the trusts during the lifetime of the settlor there had been a resulting trust to him) or whether there was on the death no liability to duty (because on failure of the prior trusts the interests of the remaindermen had been

accelerated). Upjohn, J., held that there had been a passing of the trust fund and accumulations which attracted duty. The trustees appealed.

JENKINS, L.J., delivering the first judgment, said that it was a well-settled rule applicable both to personalty and realty that where there was a gift by will to some person for life, followed by a vested gift in remainder expressed to take effect on the death of the first taker, the gift in remainder was construed as taking effect on the death of the first taker or on any earlier failure or determination of his interest. The principle was applicable to settlements *inter vivos* but it would be more difficult to show that acceleration was intended in the case of a settlement. His lordship referred to *Lainson* v. *Lainson* (1854), 5 De G. M. & G. 754, and *In re Hodge* [1943] Ch. 300, and said that in his opinion the language of the settlement gave no indication that an acceleration should take place in events such as had happened, but indicated reasonably plainly that the trusts in remainder were to take effect on the death of the settlor in the literal sense and nothing else. The trusts to take effect during the lifetime of the settlor were declared quite separately from those which were to take effect after his death, which suggested that they were independent of each other. Further this was not a case where the interests in remainder were to take effect on the death of the first taker, for the settlor was not to take any beneficial interest at all. Accordingly, the decision of Upjohn, J., that there was a passing of the trust property was correct.

ORMEROD, L.J., and LORD EVERSHED, M.R., agreed. Appeal dismissed.

APPEARANCES: *Geoffrey Cross*, Q.C., and *G. L. Dawson* (*Stanley and Co.*, for *R. Evans Parr & Co.*, Birmingham); *J. P. Pennycuick*, Q.C., and *E. Blanshard Stamp* (*Solicitor of Inland Revenue*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [1 W.L.R. 401

WAR DAMAGE: REDEVELOPMENT OF SITES: WHETHER "MAKING GOOD" DAMAGE

City of London Real Property Co., Ltd. *v.* War Damage Commission

Lord Evershed, M.R., Jenkins and Ormerod, L.JJ.

29th January, 1957

Appeals from Vaisey, J., ([1956] Ch. 607; 100 SOL. J. 634).

Section 8 of the War Damage Act, 1943, provides: "(2) If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof . . . (3) If the war damage is made good by works which include alterations or additions to the hereditament, the amount of the payment shall be an amount equal to so much of the proper cost of the works executed for the making good of the damage as falls within the permissible amount." A number of small properties belonging to the appellant company suffered war damage, in respect of which the War Damage Commission determined that a cost of works payment was appropriate. The company redeveloped the sites of the premises by constructing on part of the sites and on adjoining sites two large new buildings. The commission withheld the cost of works payments on the ground that the redevelopment was of so substantial a nature that it could not be described as making good the damage by works which included alterations or additions to the hereditament, as required by s. 8 (3) of the War Damage Act, 1943, to qualify for a cost of works payment. Vaisey, J., upheld the determination of the War Damage Commission. The company appealed.

LORD EVERSHED, M.R., said that it was to be observed that though reinstatement was expressly mentioned in s. 7 (2) and s. 8 (2), it was not mentioned in subs. (3) of the latter section; and so it was contended for the appellants that subs. (3) went far beyond what could be called *sub modo* reinstatement, and covered the substitution of an edifice quite different in its structure and scope or in the area which it covered so long as it replaced (and, perhaps, so long as it served the same uses as) the former building. The words "making good" were given some definition in s. 123 (1) of the Act where it was said that: "'making good' includes in relation to war damage demolition or clearance requisite as a preliminary to, or in the course of, the making good thereof." Save, therefore, that the words were meant to include the preliminary work to the "making good"—whatever the "making good" might mean—he doubted whether that definition materially assisted in the present cases. Notwithstanding the contentions of counsel for the appellants, he (his lordship) could not in its context construe subs. (3) of s. 8 as having the wide scope which counsel would find there. He thought that if one paid regard to the general language of ss. 5, 7 and 8 it followed that "making good" involved the notion of restoration and at least must preserve in some sense the continuance as a discernible entity of the unit or hereditament, the war damage to which had to be "made good." He thought, accordingly, that the "making good" could not be held in subs. (3) of s. 8 (and that it certainly could not be held in any other part of the section) as intended to cover a redevelopment which in no sense was equivalent to a restoration or reinstatement with alterations or additions, but which was something as to form and as to the site that it covered, that negatived any continuity in the identity of the previously developed hereditament. In his (his lordship's) judgment the matter was one of applying common sense tests; the question being, whether what had been or was to be constructed, was the old developed hereditament with the war damage "made good," with alterations and additions, or whether it was something quite different. Applying that test to the five cases under appeal, there was in each case a substitution over the whole area of a thing in essence quite different, even though the purposes which it was designed to serve were the same as those served by the buildings formerly on the site. He therefore thought that Vaisey, J., rightly concluded the matter. The appeals would be dismissed.

JENKINS and ORMEROD, L.JJ., delivered concurring judgments. Appeals dismissed.

APPEARANCES: *Harold B. Williams*, Q.C., *J. Ramsay Willis*, Q.C., and *David Trustram Eve* (*Forbes & Son*); *Michael Rowe* Q.C., and *Denys Buckley* (*Treasury Solicitor*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] [2 W.L.R. 379

MASTER AND SERVANT: CLAIM BY RESIDENT HOUSE PHYSICIAN AGAINST HOSPITAL AUTHORITY FOR LOSS BY THEFT

Edwards *v.* West Herts Group Hospital Management Committee

Hodson, Morris and Sellers, L.JJ. 31st January, 1957

Appeal from Watford County Court.

The plaintiff was employed by the defendants as a house physician at a hospital on the terms that he had to live in a staff hostel adjoining the hospital, and that his salary was £425 per annum from which £125 was to be deducted for board and lodging. After a number of his belongings had been stolen from his room, he brought an action alleging that the defendants had failed to take reasonable care of his room and effects. The county court judge dismissed the action. The plaintiff appealed.

HODSON, L.J., said that the defendants' answer to the plaintiff's case was a denial of any duty of care; the occupier of premises was under no duty to safeguard from theft the chattels of a third party; that proposition was supported by *Tinsley* v. *Dudley* [1951] 2 K.B. 18. Exceptions to that proposition were very limited. Innkeepers were excepted for particular reasons, and so were boarding-houses carried on for gain, where the proprietor was under a duty to take some care of the goods of his guests; *Dansey* v. *Richardson* (1854), 3 E. & B. 144. But in the present case the defendants were not carrying on a boarding-house; it was simply a case of master and servant where the servant received his remuneration partly in cash and partly in food and lodging. In those circumstances the observations of du Parcq, L.J., in *Deyong* v. *Shenburn* [1946] K.B. 227 applied: to the effect that there was no decision that a master, as such, must take reasonable care to ensure that no wicked person should steal his servant's goods. That applied to the facts of the present case, as the county court judge had held.

MORRIS and SELLERS, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *Neville Faulks* (*Hempsons*); *J. P. Widgery* (*Sedgwick, Turner, Sworder & Wilson*, Watford).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 415

Chancery Division

WILL: CONSTRUCTION: LEGACY "FREE OF DUTY": BEQUEST TO NAMED CHARITY: EFFECT OF AMALGAMATION WITH SIMILAR CHARITY

In re Dawson's Will Trusts; National Provincial Bank, Ltd. *v.* National Council of the Y.M.C.A. Incorporated and Others

Vaisey, J. 21st December, 1956

Adjourned summons.

The testator, who died on 31st May, 1955, by his will dated 12th February, 1955, appointed a bank to be executor and trustee thereof and by cl. 5 he gave a number of pecuniary legacies expressed to be "free of duty" including one "to the bank upon the trusts of [a named trust] such a sum as will with the moneys I have already given to the bank upon the same trusts amount to £27,000." At the date of the testator's will the trust in question had not come into being, but a trust deed dated 29th March, 1955, was made between the testator, therein called the founder, of the one part and the bank of the other part, which, after reciting that the testator had paid a sum of £100 and might thereafter pay or bequeath other sums or assets to the bank, went on to set out the purpose and objects of the trust. On the same day, the testator paid £6,000 (which included the aforementioned £100) to the bank to be held on the trusts of the trust deed and two days before his death he transferred certain assets to the value of £15,072 6s. 6d. to the bank to be held upon the same trusts, a total of £21,072 6s. 6d. Estate duty on the testator's estate was payable at the rate of 40 per cent. and, in consequence of the gifts to the bank under the deed having been made within twelve months of his death, estate duty to the amount of £8,468 3s. 5d. became payable in respect of them. By cl. 6 of his will the testator gave his residuary estate to the bank "Upon trust . . . as to one . . . fourth part thereof for the general purposes of the Church Association of 13–14 Buckingham Street, Strand, London, W.C.2," to be applied for the exclusive use and benefit of the work of that association in the city of Leeds. The Church Association was an unincorporated body whose purposes were charitable, namely, to maintain Protestant principles and to combat ritualism in the Church of England. Until June, 1950, its offices were at the address mentioned in the will. In 1950 the Church Association amalgamated informally with the National Church League (Incorporated) which had similar objects and the resultant body was called "Church Society." This body had never occupied the premises in Buckingham Street and carried on elsewhere, possibly with other activities, the work formerly carried on by the Church Association and the National Church League (Incorporated). The branch of the Church Association in Leeds had been closed in or about 1950. On the question whether the gift of a share of residue to the Church Association failed the court was asked to determine (1) whether the legacy to the trust was that sum which would make up to £27,000 the assets subject to the trust deed before estate duty had been paid out of them or after it had been paid, that is, whether the legacy was of £5,927 13s. 6d. or £14,395 16s. 11d.; and (2) whether the gift of a share of residue to the Church Association failed.

VAISEY, J., said that on the first question the proper amount of the legacy was the larger sum of £14,395 16s. 11d., firstly because it must be inferred from the general scheme of the will that the testator wanted the trust which he had founded to be put into possession of a clear sum of £27,000 and not any smaller sum; and secondly, because the words "free of duty" at the beginning of cl. 5 of the will indicated an intention that no deductions or reductions for duty were to be made. The case was in principle covered by *In re Beddington* [1900] 1 Ch. 771, which his lordship thought he should follow. On the second question, his lordship thought that the Church Society might well be the Church Association under a new name, and it was therefore entitled to succeed on its claim to this share. Its purposes undoubtedly were charitable in the legal sense of the word, and although its objects might not be identical with those of the Church Association (so that if the gift had been to the Church Association and not a gift "for its general purposes" it might have failed), nevertheless, since the purposes for which this gift was given were identifiable charitable purposes, the society ought to prepare a scheme for the approval of the court or the Charity Commissioners, unless the Attorney-General was willing that the share should be handed over to the Church Society to be applied for such of its purposes as were identical with the purposes of the Church Association at the time of its informal amalgamation with the National Church League in 1950. Declaration accordingly.

APPEARANCES: *Nigel Warren* (*A. F. & R. W. Tweedie*, for *Cook, Fowler & Outhet*, Scarborough); *J. G. Monroe* (*H. B. Nisbet and Co.*); *K. J. T. Elphinstone* (*Wainwright & Co.*); *J. Monckton* (*Biddle, Thorne, Welsford & Barnes*, for *Willey, Hargrave & Co.*, Leeds); *H. R. Williams* and *Denys Buckley* (*Treasury Solicitor*).

[Reported by Miss M. M. HILL, Barrister-at-Law] [1 W.L.R. 391

SETTLEMENT: INVESTMENT CLAUSE: "ORDINARY PREFERRED STOCK OR SHARES": SUB-DIVISION OF ORDINARY STOCK WITH PREFERENTIAL RIGHTS

In re Powell-Cotton's Resettlement; Henniker-Major *v.* Powell-Cotton

Roxburgh, J. 25th January, 1957

Adjourned summons.

The investment clause of a settlement made in 1940 contained a power to invest in "ordinary preferred stock or shares but not on deferred stock or shares of any such company." That part of the clause appeared in the editions of Key and Elphinstone's Precedents in Conveyancing from 1899 until 1940, inclusive, and accordingly in the edition current at the date of the settlement. The trustees of the settlement by this summons asked the court to determine, *inter alia*, whether the term in the resettlement "ordinary preferred stock or shares" meant (*a*) ordinary or preferred stock or shares; or (*b*) preferred ordinary stock or shares.

ROXBURGH, J., said that this investment clause extended far outside the United Kingdom, but the settlement had to be construed as an English settlement, in which English words must bear their natural meaning, and be related to English company practice. In England it was usual, though not universal, to classify shares in relation to ordinary shares. Normally, though not invariably, the order of classification was that preference shares ranked above ordinary shares, and deferred or founder or management shares ranked below ordinary shares, ordinary shares standing in the middle. At some time there developed the splitting of the class of ordinary shares so that some part of the ordinary class was preferred to some other part of the ordinary class; it was not the creation of a new class but the sub-division of the ordinary class into two categories, one of which had priority over the other within the class. This phrase "ordinary preferred stock or shares" first appeared in the sixth edition of Key and Elphinstone's Precedents in Conveyancing, published in 1899. It was not to be found in the fifth edition, published in 1896. It last appeared in the fourteenth edition of that book, published in 1940, and it was in the edition current when this settlement was executed. That circumstance made it quite impossible to say that these words represented a *lapsus calami*. If the phrase had not been intended, it could not have survived so many editions without any criticism, explanation or deletion. Logically, if ordinary shares were divided into two sub-classes, one sub-class having a preference over the other sub-class, one would call them ordinary preferred stock and ordinary deferred stock. On the other hand, the important thing for business purposes was to distinguish the two sub-classes one from the other, and for that reason the distinguishing sub-class was put ahead of the original class in denoting shares. The phrase "ordinary preferred stock" seemed to him to be logically a lawyer's description of what the market for equally good reasons called "preferred ordinary stock." In his judgment, therefore, "ordinary preferred stock" was a sub-class of ordinary stock which had some preference or priority over another sub-class of ordinary stock. Declaration accordingly.

APPEARANCES: *P. W. E. Taylor*; *G. A. Rink*, Q.C., and *Michael Browne* (*A. F. & R. W. Tweedie*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [2 W.L.R. 328

Queen's Bench Division

PRACTICE: ACTION FOR CONDEMNATION OF GOODS SEIZED BY CUSTOMS: WRIT SERVED ON OWNERS' FORMER SOLICITORS

Commissioners of Customs and Excise *v.* I.F.S. Irish Fully Fashioned Stockings, Ltd.

Ashworth, J. 13th December, 1956

Appeal from Master Burnand.

Schedule VII to the Customs and Excise Act, 1952, provides that, where the commissioners have seized goods as being liable to forfeiture, any person claiming that the goods are not so liable shall give notice to the commissioners, which in the case of a claimant outside the United Kingdom "shall specify the name and address of a solicitor in the United Kingdom who is authorised to accept service of process and to act on behalf of the claimant; and service of process upon a solicitor so specified shall be deemed to be proper service upon the claimant." The Commissioners of Customs and Excise, having seized a consignment of stockings, served notice of the seizure pursuant to Sched. VII upon the defendant company, whose registered office was in Dublin. In reply a firm of London solicitors acting for the company wrote to the commissioners on 26th August, 1955, giving notice under Sched. VII, para. 3, that it was claimed that the goods were not liable to forfeiture, and stating, pursuant to para. 4 of that schedule, that they were authorised to accept service of process and to act on the company's behalf. The commissioners issued a specially indorsed writ claiming an order of condemnation, and sent it with a copy to the solicitors, who returned them with a letter stating they were unable to obtain confirmation of their instructions to accept service. No prior notice of change of solicitors had been given to the commissioners. The commissioners, wishing to proceed in default of appearance, filed an affidavit of service under R.S.C., Ord. 13, r. 2, alleging service by sending the original and copy writ to the London solicitors. The master ruled that no proper service had been effected. The commissioners appealed.

ASHWORTH, J., said that the commissioners took the view, and rightly, that the language of the schedule compelled them to take proceedings. A notice of claim had been served, naming solicitors to accept service in accordance with the schedule; no notice of change of solicitors had been given, and it was not suggested that the firm had ceased to exist. The schedule provided what should be deemed to be proper service, and the commissioners had complied with its requirements. The affidavit of service was good and sufficient. Appeal allowed.

APPEARANCES: *Rodger Winn* (*Solicitor for Customs and Excise*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 397**

RENT TRIBUNAL: JURISDICTION TO ENTERTAIN REFERENCE BY PAYING GUEST OR LODGER

R. *v.* Battersea, Wandsworth, Mitcham and Wimbledon Rent Tribunal; *ex parte* Ambalal Parikh

Lord Goddard, C.J., Cassels and Lynskey, JJ.

18th January, 1957

Application for order of certiorari to quash a determination of a rent tribunal.

The landlady of a house entered into an agreement with one *F*, by which *F* and her two children occupied a furnished room in the landlady's house together with the right to use other rooms. By the agreement *F*, who was referred to as a paying guest, was given a key to the door of the room, but the landlady retained the right of access to the room "at all times." *F* made a reference to the rent tribunal for the district, which reduced the rent and granted her three months' security of tenure. The landlady moved for an order of certiorari to quash the determination of the tribunal on the ground that it had no jurisdiction to entertain a reference in the case of a paying guest or lodger. By s. 2 (1) of the Furnished Houses (Rent Control) Act, 1946: "Where a contract has . . . been entered into whereby one person . . . grants to another person . . . the right to occupy as a residence a house or part of a house . . . in consideration of a rent which includes payment for the use of furniture or for services, whether or not, in the case of such a contract, with regard to part of a house, the lessee is entitled, in addition to exclusive occupation thereof, to the use in common with any other person of other rooms of accommodation in the house, it shall be lawful for either party to the contract or the local authority to refer the contract to the tribunal for the district."

LORD GODDARD, C.J., said that the document constituting the agreement was in the form of a letter drafted for the landlady on the view that if she called a person a paying guest it might have some effect on the legal relationship between them so far as the relevant Acts were concerned. But the court had to look at the effect of the document in law. Section 2 of the Act of 1948 provided for the case where a person had exclusive occupation of some room or some part of a house and used the other part of the house in common with other occupants. Here it was said that *F* had not exclusive occupation of her room because the landlady was given access. But his lordship could not think that the landlady, by putting in words to say that she was to have access to the room occupied by *F*, had done enough to defeat the Act or to say that *F* had not exclusive occupation. *F* had the right to use other rooms, and on the facts his lordship thought that she had an exclusive right to use her room as a residence. Accordingly the tribunal had power to entertain the application, and the motion failed.

CASSELS, J., concurring, said that a paying guest was not accurately described when she had to do all her own work in connection with her accommodation and was only provided with a little food.

LYNSKEY, J., also concurring, said that what had to be done by a contract within s. 2 was to give a person a right to occupy a house or part of a house as a residence. Nothing in the Act required that there should be a letting of possession. What was given was a right to occupy, which was a different matter and a different right. Exclusive occupation in this section was exclusive occupation as a residence, and the fact that a right of access from time to time was reserved to the landlord did not of itself destroy that right to exclusive occupation as a residence when furniture and keys had been handed over. Application dismissed.

APPEARANCES: *R. A. R. Stroyan* (*Pollards*); *Rodger Winn* (*The Solicitor, Ministry of Health*).

[Reported by Miss M. M. HILL, Barrister-at-Law] **[1 W.L.R. 410**

PLANNING: ENFORCEMENT NOTICE: NON-COMPLIANCE: REPEATED OFFENCES: RELATOR ACTION: INJUNCTION

A.-G. *v.* Bastow

Devlin, J. 29th January, 1957

Action.

Despite the refusal of his application for permission to develop his land as a caravan site, the defendant began and continued to use his land for parking caravans for human habitation. On 8th May, 1952, the local authority served on him an enforcement notice pursuant to the Town and Country Planning Act, 1947, s. 23, requiring him to discontinue using the land as a caravan site and to remove the caravans. The defendant refused to do so and on 3rd September, 1953, 14th January, 1954, and 6th April, 1954, he was convicted by a court of summary jurisdiction of an offence under s. 24 (3) of the Act and fined £20, £30 and £75 respectively. He failed to pay the last fine and was sentenced to one month's imprisonment in default. On 8th October, 1954, the Attorney-General, on the relation of the local planning authority, issued a writ claiming an injunction perpetually restraining the defendant from using the land or causing or permitting it to be used as a caravan site. After the issue of the writ, on 27th January, 1955, the defendant was charged before a court of summary jurisdiction with an offence under s. 23 (4) in his continuance of the wrongful user of the land for 278 days after his previous conviction. He was fined £100, which he failed to pay, and was sentenced to three months' imprisonment in default.

DEVLIN, J., said that the first question was whether there was jurisdiction in the court to grant a remedy by way of injunction in a case where the statute itself prescribed what steps were to be taken to enforce the law. The second question, if he (his lordship) found that he had jurisdiction, was whether it was a proper case for him to grant an injunction. On the first point counsel for the Attorney-General had relied upon two authorities, both decisions at first instance. The first was *A.-G.* v. *Ashborne*

Recreation Ground Co. [1903] 1 Ch. 101, a decision of Buckley, J. The second was a decision of Farwell, J., in *A.-G.* v. *Wimbledon House Estate Co., Ltd.* [1904] 2 Ch. 34. Those cases established that a remedy by injunction for a breach of a statute existed only if a right had been infringed. The mere fact that an illegality had been committed because the provisions of a statute had been broken was not, of itself, enough. The statute, presumably, would provide for what was to happen in such circumstances by way of a penalty, as it did provide in this case, and no other remedy was open unless a right had been infringed. However, the judgment of Buckley, J., also decided that, for this purpose, a public right was sufficient if the suit be by the Attorney-General, who was the only authority who had a right to bring a civil suit upon the infringement of public rights. The judgment of Buckley, J., was followed by Farwell, J., in the later case to which he (his lordship) had referred. They were judgments at first instance and, therefore, not absolutely binding upon him as authority, but they were judgments that had stood for half a century. If a different view of the law was to be taken, in his view it was right that it should be taken by a higher court. He followed, therefore, the principle that had been laid down by Buckley, J. He was satisfied that in this case the Attorney-General was seeking to enforce a public right and therefore that the court had jurisdiction to grant an injunction in a proper case. It was nonetheless a public right because it was one which had been given by the statute which, in this case, had been infringed. That still left the second question to be determined. His lordship referred to the circumstances in which the present action was brought and said that the Attorney-General was the officer of the Crown who was entrusted with the enforcement of the law. If he, having surveyed the different ways that were open to him for seeing that the law was enforced and that it was not defied, had come to the conclusion that the most effective was to ask the court for a mandatory injunction—and he (his lordship) was satisfied that the very nature of a relator action meant that the Attorney-General had surveyed those ways and had come to that conclusion—then he (his lordship) thought that this court, once a clear breach of the right had been shown, should only refuse the application in exceptional circumstances. He was dealing purely with that type of case in which the only substantial ground for not granting an injunction was that there were other remedies available. In cases where other circumstances which were not primarily a matter for administrative discretion arose, then different considerations might apply and a different view be taken. He thought, therefore, that the plaintiff had satisfied him that he had jurisdiction to grant the relief sought, and that it was a proper case in which he ought to grant that relief. Injunction granted.

APPEARANCES: *J. P. Widgery* (*Sharpe, Pritchard & Co.*, for *P. L. Cox*, Hornchurch); *L. John Davies* (*Jas. H. Fellowes*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] **[2 W.L.R. 340**

Probate, Divorce and Admiralty Division

DIVORCE: CONFLICT OF JURISDICTION: FOREIGN DECREE

Arnold *v.* Arnold

Mr. Commissioner Latey, Q.C. 24th January, 1957

Undefended petition by husband for a declaration that his marriage had been validly dissolved in Finland by a decree granted to his wife or, in the alternative, for a divorce on the ground of desertion, in the exercise of the court's discretion. The husband, a British subject born and domiciled in England, married a Finnish national in London in 1922. Later that year they went to Helsingfors, Finland, where the wife's family lived; and the husband acquired a domicile of choice in that country. Two children were born to them in 1924 and 1926. In 1930 the husband returned to England leaving his wife and children in Finland, and cohabitation was never resumed. The wife, however, retained her British nationality. Shortly afterwards the husband reverted to his English domicile of origin. In March, 1940, the Court of Appeal at Abo, Finland, reversing a decree of a municipal court based on failure to adduce proper evidence, held that the husband had wilfully and without valid cause deserted the wife in 1930. Founding its jurisdiction upon a Finnish law of 1929 whereby proceedings for divorce could be commenced if the parties had last lived together in Finland, but the spouse who was defendant had deserted the other spouse, the Court of Appeal pronounced a divorce upon the ground of desertion for at least one year. The husband did not learn of the divorce until the end of the war, although there had been a form of substituted service. In the meantime he had formed a liaison with another woman by whom he had had two children born after the divorce.

Mr. Commissioner LATEY, Q.C., reading his judgment, considered *Travers* v. *Holley* [1953] P. 246; *Carr* v. *Carr* [1955] 1 W.L.R. 422; *Dunne* v. *Saban* [1955] P. 178 and *Warden* v. *Warden* [1951] S.L.T. 406 and the report of the Royal Commission on Divorce, 1956, and said that the basis of jurisdiction in divorce did not depend on the grounds, unless under the private international law rules governing the jurisdiction of a court it was limited to pronouncing a decree only where the law of the domicile or the nationality of the spouse provided substantially the same ground. The fact of desertion was a ground common to both English and Finnish laws; but it was quite clear that in general a decree of divorce of a competent foreign court must be recognised in this country although the ground of divorce in the foreign country was not one which would be effective in the English court. The principle laid down in *Travers* v. *Holley*, *supra*, was binding and not merely *obiter*, though at first sight it might have appeared to be *obiter*. In all these cases the court had to look at the realities. In the present case the parties had not only last lived together in Finland when the husband was held to have deserted the wife: they were, in fact, domiciled in Finland according to English law at the date of the desertion. The wife, moreover, had been continuously resident in Finland for many years immediately preceding the divorce. The fact that only six weeks or sixty or ninety days' residence sufficed in certain States in the United States of America to found jurisdiction seemed to be beside the point if in fact there had been, say, two years' residence or more, or even less, if the residence was genuine and *bona fide* and not merely for the purpose of getting a divorce in a convenient court. The necessity laid down by statute in England for three years' residence, in the case of a wife whose husband is domiciled abroad, was probably due to the notion that our courts could not be used for the convenience of birds of passage, and that the court had to satisfy itself that the petitioning wife had chosen her home in England, though by operation of law her domicile was that of her husband domiciled abroad, and living either abroad or in England. Each case must be dealt with according to the facts and the law of the place where a decree was granted. In this case he (the commissioner) was quite satisfied that the principle in *Travers* v. *Holley*, *supra*, applied, and he would make the declaration prayed for. Declaration as prayed.

APPEARANCES: *John B. Gardner* (*J. A. H. Powell*, The Law Society Divorce Department).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] **[2 W.L.R. 366**

Mr. E. J. ANDREWS, legal assistant in the Town Clerk's Department at Smethwick, Staffordshire, has been appointed assistant solicitor in the Clerk's Department of Shrewsbury Borough Council.

Mr. JOHN BOWKER, solicitor, of Winchester, has been appointed Resident Magistrate, Northern Rhodesia.

Mr. F. A. CHUA, District Judge and First Magistrate, Singapore, has been appointed a Puisne Judge, Singapore.

Mr. A. R. RICKARD has been appointed deputy clerk to the magistrates of the Willesden Division.

Mr. WALTER HAROLD HAIG has been appointed Official Receiver for the Bankruptcy District of the County Courts of Birmingham, Coventry, Dudley, Hereford, Kidderminster, Leominster, Stourbridge, Walsall, Warwick, West Bromwich, Wolverhampton, Worcester, in succession to Mr. R. K. Clark, O.B.E., who has retired.

Mr. A. C. PARKHOUSE, assistant solicitor to Northampton Corporation, has been appointed deputy town clerk of Northampton in succession to Mr. T. W. Storr, who will be retiring shortly.

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time:—

Consolidated Fund Bill [H.C.] [14th February.

Read Third Time:—

Commonwealth Settlement Bill [H.C.] [12th February.
Transport (Railway Finances) Bill [H.C.] [14th February.

In Committee:—

Rating and Valuation Bill [H.C.] [14th February.
Shops Bill [H.L.] [12th February.

HOUSE OF COMMONS

PROGRESS OF BILLS

Read First Time:—

National Insurance Bill [H.C.] [13th February.

To provide for modifying the provisions of the National Insurance Act, 1946, under which persons are treated as having retired; to amend the conditions of entitlement to certain benefits payable out of the National Insurance Fund or the Industrial Injuries Fund; to provide for an additional description of benefit under the aforesaid Act in respect of a child; to amend the provisions of that Act as to contributions in respect of periods as an insured person under the age of sixteen; and for purposes connected with the matters aforesaid.

Read Second Time:—

Aerial Advertising Bill [H.C.] [15th February.
Animal Boarding Establishments Bill [H.C.] [15th February.
Maintenance Agreements Bill [H.C.] [15th February.

Read Third Time:—

Northern Ireland (Compensation for Compulsory Purchase) Bill [H.C.] [15th February.

STATUTORY INSTRUMENTS

Approved Schools (Contributions by Local Authorities) Regulations, 1957. (S.I. 1957 No. 163.)

Cardiff (Amendment of Local Enactment) Order, 1956. (S.I. 1957 No. 175.)

Coal Industry (Superannuation Scheme) (Winding Up, No. 11) Regulations, 1957. (S.I. 1957 No. 156.) 7d.

County Court (Amendment) Rules, 1957. (S.I. 1957 No. 174 (L.1).) 6d. See p. 156, *ante*.

Exported Cattle Protection Order, 1957. (S.I. 1957 No. 170.) 5d.

Justices' Allowances Regulations, 1957. (S.I. 1957 No. 197.)

London Traffic (Prescribed Routes) (Chislehurst and Sidcup) Regulations, 1957. (S.I. 1957 No. 188.)

London Traffic (Prescribed Routes) (St. Pancras) Regulations, 1957. (S.I. 1957 No. 189.) 5d.

London Traffic (Prescribed Routes) (Westminster) Regulations, 1957. (S.I. 1957 No. 190.) 5d.

Matrimonial Causes (Amendment) Rules, 1957. (S.I. 1957 No. 176 (L.2).) 8d. See p. 178, *ante*.

National Service (Miscellaneous) (Amendment) Regulations, 1957. (S.I. 1957 No. 180.) 5d.

Ossett (Water Charges) Order, 1957. (S.I. 1957 No. 169.)

Petroleum-Spirit (Conveyance by Road) Regulations, 1957. (S.I. 1957 No. 191.) 8d.

Retention of Mains and Pipes under Highways (Durham) (No. 1) Order, 1957. (S.I. 1957 No. 171.) 5d.

Stopping up of Highways (Bristol) (No. 1) Order, 1957. (S.I. 1957 No. 161.) 5d.

Stopping up of Highways (Kent) (No. 2) Order, 1957. (S.I. 1957 No. 157.) 5d.

Stopping up of Highways (Lancashire) (No. 5) Order, 1957. (S.I. 1957 No. 165.)

Stopping up of Highways (Leicestershire) (No. 2) Order, 1957. (S.I. 1957 No. 167.) 5d.

Stopping up of Highways (Northamptonshire) (No. 2) Order, 1957. (S.I. 1957 No. 168.) 5d.

Stopping up of Highways (Nottinghamshire) (No. 3) Order, 1957. (S.I. 1957 No. 166.) 5d.

Stopping up of Highways (Staffordshire) (No. 1) Order, 1957. (S.I. 1957 No. 158.) 5d.

Stopping up of Highways (West Riding of Yorkshire) (No. 6) Order, 1957. (S.I. 1957 No. 162.) 5d.

Teachers' Superannuation (Royal Naval College, Dartmouth) Amending Scheme, 1957. (S.I. 1957 No. 164.)

Traffic Signs Regulations and General Directions, 1957. (S.I. 1957 No. 13.) 5s. 2d.

Wages Regulation (Tin Box) Order, 1957. (S.I. 1957 No. 173.) 6d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

PRINCIPAL ARTICLES APPEARING IN VOL. 101

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices: 21 Red Lion Street, London, W.C.1. Telephone: CHAncery 6855.

Annual Subscription: Inland £3 15s., Overseas £4 5s. (payable yearly, half-yearly or quarterly in advance).

Advertisements must be received first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).